

Stations whose MSAs do not truly represent their potential minority (and female) labor pool are subjected to sanctions for failure to meet processing and recruitment guidelines but are barred from justifying their failure to recruit. Yossarian himself could not have envisioned a more tortured agency policy.<sup>10/</sup> The Joint Parties therefore believe that the test should more accurately reflect a more realistic view of a station's actual service area.

The Joint Parties urge the Commission to allow use of alternate labor force statistics whenever a station demonstrates that the MSA does not accurately reflect its actual service area or when commuting patterns and current employee residence demonstrates that the MSA is not the area within which it can realistically be expected to recruit employees. Such a less restrictive "waiver" policy would enable stations and the FCC to assess more accurately whether the stations' recruiting practices are reaching minorities and women in the stations' service area.

## **2. Joint Recruiting, Training Programs and Part-time Employees.**

The current FCC EEO Rules are overly narrow in at least one respect: the Commission does not truly "credit" stations for creative approaches to recruiting and training of minorities and women. The Joint Parties therefore agree with the proposal to grant EEO "credit" to stations that utilize a central recruiting

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<sup>10/</sup> Yossarian is the main character of Joseph Heller's famous novel, "Catch-22."

office. The Joint Parties also agree with the suggested methodology for assuring that the central recruiting office serves as the functional equivalent of individual recruiting, and reiterate that, to the extent the use of a central recruiting office is effective, it must eliminate the need for the licensee to maintain job-by-job records in addition to those kept by the recruiting office.

The FCC also must consider the extent to which its EEO enforcement discounts the recruiting efforts of stations in small and medium-sized markets. These stations provide an effective training ground for minorities and women, enabling them to hone their skills early in their broadcast careers. Often, after polishing their skills at these stations, talented minorities and women will move along from the "farm team" to the "big leagues," where the training facilitates long-term significant employment opportunities.

Unless these minority and female employees happen to be employed during the pay period used in completing the annual employment report (FCC Form 395-B), the current system provides no method for the station to receive "credit" for the training opportunities it has provided.

The Joint Parties therefore agree with the proposal in the Notice that would credit stations which participate in minority training, internship and employment programs. Such programs often can lead to full-time employment and should be recognized as a significant plus in a station's EEO compliance record. The

Joint Parties suggest that the FCC use the "credit" for station training programs (or other inventive programs) to mitigate any further investigation or forfeiture that a station otherwise not in compliance with the EEO Rules might receive.

Specifically, the FCC now typically issues a "letter of inquiry" to a renewal applicant that has not met the EEO processing guidelines during its license terms. The Joint Parties propose that "credit" for significant training or internship programs be given at this point: if a station has not met the processing guidelines but has operated a recognizable and significant minority training or internship program, the Commission would grant renewal without further inquiry.<sup>11/</sup>

The FCC also should give substantive credit, as the Joint Parties have proposed for training programs, based on the number of minority and female part-time employees on a station's staff (should the station choose to maintain those statistics) during the six-month period prior to annual EEO filing and for the period covered by renewal application filings. This six-month "holding" period will prevent licensees from stacking part-time minorities and women on their staffs at crucial times but will reward those stations which truly -- and voluntarily -- provide part-time employment opportunities, opportunities which, as noted above can serve the same practical purposes as training programs.

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<sup>11/</sup> Stations with training programs or internships that did not include minorities or women during the applicable review period would remain subject to "letter of inquiry" procedures.

**C. The FCC Should Not Adopt Its Flawed And Overly  
Statistic-Driven Forfeiture Guidelines.**

The proposed forfeiture guidelines represent a fundamental substantive change in the Commission's EEO Rules and deviate from what has been the Commission's announced objective of its equal employment opportunity requirements: actual efforts to enhance employment opportunities minorities and women. The Joint Parties therefore oppose adoption of the proposed forfeiture guidelines.<sup>12/</sup> If the FCC does adopt the guidelines, it must, at a minimum, clarify and reconsider them so as to more closely align them with the ultimate policy objectives of affirmative action requirements.

**1. The Guidelines Do Not Reflect The Goals Of  
The FCC Rules.**

The Commission's 1987 EEO Report reoriented the Commission's EEO enforcement focus from statistical employment profile analyses to concentration on actual EEO efforts.<sup>13/</sup> As the Commission later explained the EEO Report,

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<sup>12/</sup> The Joint Parties believe that the FCC should limit use of short term renewal (in all cases) as a sanction for non-compliance with the EEO Rules. The FCC is not an EEO enforcement agency. Thus, its EEO rules should not be penal in nature. 1992 License Renewal Applications For 28 Broadcast Facilities Licensed to the Philadelphia, PA. Area, 53 FCC2d 104, 113 and n.11 (1975). There is more benefit to all affected parties, including potential local minority and female employees, if the Commission simply extends the reporting period and requirements for those few stations which actually receive sanctions (approximately 4% of reporting stations during the previous renewal cycle).

<sup>13/</sup> Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987) ("EEO Report").

we have repeatedly emphasized the importance of recruiting qualified minorities and women. Recruitment efforts became more important when, in June 1987, the Commission adopted an efforts-oriented EEO program. The Commission believed that the principal element of a good EEO program was the effort undertaken to attract qualified minority and female applicants whenever vacancies occurred, rather than relying on a station's statistical profile.<sup>14/</sup>

Subsequent Commission decisions repeatedly stressed the Commission's "primary concern" with licensees' efforts. See, e.g., Michigan and Ohio Renewals, 3 FCC Rcd 6944 (1988) ("our primary concern is the broadcaster's efforts"); 1993 EEO Report at ¶ 3 ("When reviewing a broadcaster's EEO compliance at renewal time, our primary focus is on the licensee's overall EEO efforts."). Commission decisions imposing sanctions on or cautioning stations whose statistical employment profiles complied with applicable guidelines or which had actually hired large numbers of minorities but which lacked the requisite efforts only served to emphasize the paramount importance

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<sup>14/</sup> Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, FCC 89-44 at ¶ 5 (rel. Feb. 22, 1989). Although the Commission also noted the importance of self-evaluation, the EEO Report specifically indicated that self-evaluation was to be but one of a number of optional program elements ("...the rules plainly indicate that the specific program elements, including those relating to the station's self-evaluation of its EEO profile, are intended to serve only as examples of the types of activities that would fulfill the EEO requirements." EEO Report, 2 FCC Rcd at 3969), so that a failure to self-evaluate cannot, in and of itself, serve as the basis for sanctions.

apparently attached to good faith efforts.<sup>15/</sup> Indeed, the Commission recently reaffirmed that:

[o]ur EEO Rule does not require licensees to achieve a specific percentage of minority applicants or hires. Our primary focus is on the licensee's recruitment and self-assessment efforts.

KTEB-TV Foundation, FCC 96-68 (rel. Mar. 11, 1996).

Basing imposition of a forfeiture upon the number of minorities included in individual applicant pools does not accurately measure a licensee's actual EEO efforts.<sup>16/</sup> Instead, any forfeiture standards should be grounded in the percent of vacancies for which the stations actually recruited. Any other measure of compliance transforms the FCC's effort-based policies into rigid result-based quotas. Pursuing such a course of enforcement would transform the FCC into an EEO agency, which it is not.

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<sup>15/</sup> See, e.g., California License Renewals, FCC 91-134 (May 3, 1991) at par. 16 (criticizing a licensee because "[i]t places undue emphasis on meeting the processing guidelines rather than consistently engaging in EEO efforts to attract minority applicants when vacancies occur."), citing Park Communications, Inc., 3 FCC Rcd 1907, 1909-1910 (1988); Arkansas License Renewals, FCC 91-238 (August 15, 1991).

<sup>16/</sup> The Commission has long used "50/50" EEO processing guidelines, and, indeed, recently reaffirmed their importance. 1993 EEO Report, supra. The forfeiture guidelines fail to reference those limits or to explain their relationship with the new "66%/33%" requirements. The Joint Parties propose that the Commission maintain the "50/50" guidelines as expressed in FCC precedent. The FCC has offered no reason for a change, and without an explanation, the new limits would violate the Administrative Procedure Act. See Office of Communication of the United Church of Christ, 560 F.2d 529 (2d Cir. 1977) (vacating 1976 Non-discrimination Order for failure to justify rule changes).

Under the proposed guidelines, for example, if a licensee had 100 applicant pools, 1000 applications, and one minority applicant in each applicant pool, it would substantially exceed the forfeiture guidelines' 66% threshold. By contrast, a licensee which also had 100 applicant pools and 1000 applications, but whose 100 minority applicants were distributed less equally (such as 4 applicants in each of 25 applicant pools) would not satisfy the guidelines and would be subject to sanctions, even though its recruitment efforts had precisely the same result in terms of the presence of minority applicants as those of the first licensee. Further, if a third licensee had 100 applicant pools and 1000 applications, and 200 minority applicants distributed in only 20 applicant pools, its recruitment efforts would be considered even less effective under the forfeiture guidelines' standards, even though they had clearly been far more effective in attracting minority applicants.

Similarly, the proposed guidelines discriminate against stations located in areas with relatively small minority group populations. For example, assume that a station located in an area with 15% minority population obtained 150 applications for 150 job openings, 60 of which were received from members of minority groups. That station's recruitment efforts were clearly successful -- minorities were recruited at a rate equal to four times work force parity -- yet the station would nonetheless be subject to sanctions under the guidelines.

The forfeiture guidelines' apparent focus upon one measure of the success of, rather than the fact of, recruitment efforts also penalizes stations which in good faith engaged in significant recruitment efforts but whose efforts were unsuccessful. As noted above, the Commission has repeatedly emphasized that its EEO enforcement focus would be on licensees' recruitment efforts. The forfeiture guidelines apparently move beyond this obligation to require that efforts not only occur, but that they be successful.

No licensee can guarantee that its recruitment contacts will result in referrals. Results are completely beyond a licensee's control. To impose penalties in those circumstances is patently unfair. A licensee cannot control or affect the fact that, for whatever unknown reason, a particular source fails to refer minority applicants in response to a request. Yet the Commission proposes to impose sanctions for precisely that reason.

The inequity of that result is particularly evident in the fact that stations in a single market may frequently contact the same recruitment sources -- with far different results. To sanction some market stations and not others based solely on the happenstance that one station's recruitment contacts were fortuitously more successful than another's, is obviously unfair. Yet the Commission's forfeiture guidelines would produce that result.

The Commission should focus on the actual results of recruitment efforts. The forfeiture guidelines' emphasis on the



number of particular applicant pools which includes minorities rather than considerations such as the proportion of minorities actually interviewed and hired cannot accurately measure the actual effectiveness of a licensee's recruitment efforts. Minority representation in individual applicant pools does not accurately reflect the extent of a licensee's actual recruitment efforts, and efforts are supposed to be the touchstone of EEO enforcement.

A better measure of those efforts is the proportion of job vacancies for which affirmative recruitment outreach efforts were made, possibly supplemented by increased emphasis on proportionate minority and female representation in all applicant/interview pools or minority/female hires over the relevant license term compared with relevant labor force representation.<sup>17/</sup>

## **2. The Guidelines Would Be Too Rigid.**

Even if the guidelines were more precisely aligned with the goals of EEO policy, they would be inappropriate and should not be adopted: the reasoned balancing of factors required for a fair and equitable resolution of EEO violations does not lend itself to the rote application of broadly crafted forfeiture

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<sup>17/</sup> In addition, the FCC should not consider a position "vacant" if the licensee intends to fill that position through an employee promotion. Given the turnover rate for broadcast employees, licensees should be entitled to encourage staff stability through promotions without having those promotions negatively affect EEO compliance.

guidelines. When determining whether to impose a forfeiture for any violation of the Act (and the amount of the forfeiture), the FCC must consider "the nature, circumstances, extent and gravity of the violations, and the station's record of compliance with the FCC's rules." 47 U.S.C. § 503(b)(2). In imposing EEO sanctions, the FCC also has examined the station's size, the number of hiring opportunities, MSA size, recruitment patterns, applicant and interview pools, assessment and record keeping. Lotus Communications, Inc., FCC 96-6, at 4 (rel. Mar. 20, 1996).

Thus, the FCC consistently has engaged in the careful weighing of unique considerations which is the hallmark of a true discretionary policy. The FCC proposes to abandon this precision and discretion with generalities and rigidity. In short, the Act and the FCC's EEO rules permit the FCC to wield a scalpel in reforming EEO violators; the FCC now proposes to use a chain saw. The Commission asserts that the guidelines will give a greater sense of certainty to licensees in forfeiture cases. However, the present case-by-case method provides all the certainty a licensee needs, while freely permitting the Commission to respond to particularities, especially any mitigating circumstances.

### 3. Revisions To The Guidelines.

Should the FCC nonetheless adopt guidelines imposing penalties for EEO violations, the Joint Parties urge that the FCC revise the guidelines as follows.

Adequate Pool. The forfeiture guidelines repeatedly use the term "adequate pool of minority/female applicants or hires." Given the critical importance of "adequate pools" to the forfeiture guidelines' enforcement standards, the Commission should define an adequate pool as persons who actually complete and submit applications.

License Term. The forfeiture guidelines propose to measure recruitment efforts throughout "the license term being reviewed." However, EEO inquiries which are routinely sent to licensees generally relate to far less than full five- and seven-year license terms. Upward adjustments are imposed if there has been a large number of hiring opportunities but an insufficient pool of applicants/hires;<sup>18/</sup> again, the forfeiture guidelines do not specify the time period which will be considered. The Commission should clarify that forfeiture determinations will be based upon a specified time period and, more important, provide explicit guidance as to proper record retention procedures for licensees.

Low Percentage of Minorities in Relevant Population. A downward adjustment is available in circumstances in which minorities constitute less than 6% of the relevant labor force.

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<sup>18/</sup> The Commission does not specify whether it will look at applicants or hires or both; clarification is also appropriate in this regard.

Because stations located in areas where minorities constitute less than 5% of the relevant labor force are not even required to adopt EEO programs with respect to minorities, this downward adjustment has little, if any practical impact. The Joint Parties suggest that the benchmark for the availability of this downward adjustment be increased to 12% of the relevant labor force, commensurate with the Joint Parties' proposal to exempt stations located in areas where minorities constitute less than 12% of the relevant labor force from EEO record-keeping requirements.

**D. The FCC Should Adopt Specific Rules For Joint EEO Filing By Co-Owned And Co-Located Stations And For Stations Being Operated By LMA.**

The FCC should review the 1994 Interpretive Ruling regarding combined EEO filings by jointly-owned co-located stations. See Petition for Issuance of Interpretive Ruling Concerning FCC Form 395-B, Broadcast Annual Employment Report, 9 FCC Rcd 2535 (1994) ("Interpretive Ruling"). Specifically, the Joint Parties propose that the FCC permit joint filings so that jointly-owned co-located stations and stations being programmed pursuant to LMAs may take advantage of their natural economies of scale by filing combined EEO program reports reflecting employment at all commonly-owned or operated stations.<sup>19/</sup>

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<sup>19/</sup> The Joint Parties acknowledge that, in light of a congressional prohibition on altering television stations' EEO reporting forms, 47 U.S.C. § 334 (1996), the Interpretive Ruling necessarily must be limited to radio stations.

1. Commonly-owned, Co-located Stations.

The Interpretive Ruling requires licensees of jointly-owned stations to divide employees between jointly-owned stations for purposes of Form 395-B. Where employees truly work for both stations, the licensee may file one Form 395-B reporting joint station employees, and a separate Form 395-B for the remaining employees at the licensee's other station. 9 FCC Rcd at 2536.

The changes to the radio multiple ownership rules mandated by the Telecommunications Act of 1996 (the "Act"), Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), have rendered this portion of the Interpretive Ruling obsolete and nonsensical. Single entities now may own up to eight stations in a radio market. It is possible (indeed, the period since the signing of the Act has proven) that a licensee may co-locate the offices for many, if not all, of such station combinations and may unify employment. In the interests of operational efficiencies, licensees likely will combine their hiring and personnel departments and certain employees, especially sales staff, will perform many tasks for numerous stations.

Permitting the joint filing of a single annual employment report for multiple co-located, commonly-owned radio stations would reduce the administrative record-keeping burden for licensees that effectively will run many stations with "one" staff, not to mention the artificial "assignment" of employees to particular stations. By combining all co-owned (or co-owned and co-located) radio stations on one EEO Report, the Commission

would obtain a more accurate picture of a particular licensee's actual hiring practices.

## 2. LMAs.

The FCC should clarify that the joint filings permitted by the Interpretive Ruling also apply to radio stations being operated pursuant to LMAs. At a minimum, the Commission should conform FCC Form 395-B to the joint filings permitted by the Interpretive Ruling. This could be accomplished simply by adding a question to the form such as, "Is the station currently subject to an LMA?", "If so, indicate the other station or entity brokering time, and the number of employees still employed by the licensee."

## III. CONCLUSION.

The Joint Parties are deeply committed to maintaining strong and effective EEO programs that are consistent with the FCC's jurisdiction over EEO enforcement. However, the FCC's EEO enforcement policies and requirements have broken away from their narrow jurisdictional mooring. Although its primary responsibility is not EEO enforcement, the Commission now imposes onerous, time-consuming and largely unnecessary requirements on licensees, few of which reflect the day-to-day realities of operating a broadcast station.

The Notice proposes effective solutions to some of these problems but does not reach far enough for some and leaves others

unaddressed. The Joint Parties have proposed that the Commission extend to all "qualifying" stations the EEO relief provided under the current rules to stations employing fewer than five persons. The Joint Parties have proposed that "qualifying stations include (1) stations with 12 or fewer full-time employees; (2) stations whose minority labor force is 12% or less; and (3) stations that met a benchmark of 75% parity with minority and female labor force statistics both overall and for upper-level employees for the majority of the previous license term.

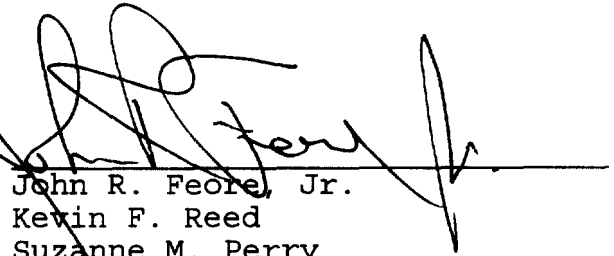
The Joint Parties have addressed the proposal regarding alternative labor force statistics, suggesting that the Commission abandon the current test and evaluate EEO compliance based on alternate data whenever the MSA labor force statistics are not representative of a station's service area or if the station can demonstrate that the MSA is not likely to be a realistic source of potential employees. The Joint Parties also urge the Commission to exclude part-time employees from EEO consideration and that the Commission not adopt its flawed forfeiture guidelines. Finally, although the Notice did not raise the issue, the Joint Parties have suggested that the Commission permit joint EEO filing for co-owned, co-located, and LMA'd radio stations.

The FCC's own statistics reveal that most stations comply with even the FCC's more onerous EEO rules and requirements. The Commission should recognize the limitations of its EEO jurisdiction and grant significant EEO relief to stations which comply with the present rules.

Respectfully submitted,

AMERICAN RADIO SYSTEMS CORPORATION  
BLADE COMMUNICATIONS, INC.  
COSMOS BROADCASTING CORPORATION  
COX ENTERPRISES, INC.  
FIRST MEDIA TELEVISION, L.P.  
GREAT EMPIRE BROADCASTING, INC.  
IMS BROADCASTING, LLC  
NEW CENTURY SEATTLE PARTNERS, L.P.  
PAXSON COMMUNICATIONS CORPORATION  
PRETTYMAN BROADCASTING COMPANY  
SIMMONS NEW MEXICO, INCORPORATED  
SIMMONS FAMILY, INCORPORATED  
TAK COMMUNICATIONS, L.L.C.  
WABASH VALLEY BROADCASTING CORPORATION

By:



John R. Feore, Jr.  
Kevin F. Reed  
Suzanne M. Perry  
H. Anthony Lehv

Their Attorneys

DOW, LOHNES & ALBERTSON, P.L.L.C.  
1200 New Hampshire Avenue, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 776-2000

Dated: July 11, 1995



**Attachment A**

The following entities comprise the Joint Parties of these Comments:

American Radio Systems Corporation

Blade Communications, Inc.

Cosmos Broadcasting Corporation

Cox Enterprises, Inc.

First Media Television, L.P.

Great Empire Broadcasting, Inc.

IMS Broadcasting, LLC

New Century Seattle Partners, L.P.

Paxson Communications Corporation

Prettyman Broadcasting Company

Simmons New Mexico, Incorporated

Simmons Family, Incorporated

TAK Communications, L.L.C.

Wabash Valley Broadcasting Corporation